IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

S.A. No. 304/2004

Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	**Court's or Judge's Orders.**

CORAM : **A.P. Lavande,J**
DATE : 21th November, 2006

Heard Mr. B. S. Deshpande, learned counsel for the appellant and Shri S. V. Purohit, learned counsel for respondent no.1. Respondent no.2 is absent.

2. Challenge in this appeal is to the Judgment and decree dated 5th April, 2004 passed by the Additional District Judge, Khamgaon in Regular Civil Appeal No. 69/2000 allowing he appeal filed by the defendants against the Judgment and decree dated 1.7.2000 passed by the Civil Judge, Junior Division, Nandora in Regular Civil Suit No. 10/98 decreeing the suit filed by the plaintiff.

3. The plaintiff filed the above referred suit for recovery of possession of the land admeasuring 38 Ares out of the land bearing gat no. 153 situated at village Khadadgaon, Taluka Nandura, Distt. Buldhana from the defendants on the ground that the defendants had encroached on the land of the plaintiff.

4. The suit was contested by the defendants. The trial court upon appreciation of the evidence led by the parties held that the plaintiff had proved his case and consequently decreed the suit. The lower appellate Court in appeal preferred by the defendants reversed the decree holding that the plaintiff had not proved encroachment to the extent of 38 Ares upon the land of the plaintiff.

5. Mr. Deshpande, learned counsel appearing for the appellant submitted that the lower appellate Court erred in reversing well reasoned Judgment passed by the trial Court without any cogent reason. The learned counsel further urged that the lower appellate court erred in not considering the admission of the defendants by way of suggestion to the plaintiff made by the defendants that they had been encroaching upon the property of the plaintiff. Lastly, he urged that the defendants did not produce the sale-deed by which they purchased the property bearing gat no. 152 which would have clearly proved the encroachment by the defendants.

6. Per contra, Mr. Purohit, the learned counsel appearing for the respondent no.1 invited my attention to the findings given by the lower appellate Court, more particularly in paragraphs 9 to 12 of the impugned Judgment. The lower appellate Court held that the plaintiff

had admitted that at the time of purchase of the property bearing gat no. 153 the plaintiff had not measured the area of the field. The lower appellate court also held that the plaintiff Namdeo had admitted that there was a bund between the properties of the plaintiff and defendant and this fact was not mentioned in the plaint. Moreover, Sadashiv, the witness examined by the plaintiff who prepared the map (Exh. 24) did also show the bund in the suit map between the properties of the plaintiffs and the defendant. Another important aspect which the lower appellate court has considered is that the plaintiff in cross-examination had admitted that the road going to village Bor Jawala was passing through his field and about 7 to 8 gunthas land adjoining to this road was lying barren and Sadashiv had not shown the said road in the map prepared by him. Relying upon all these infirmities the lower appellate Court allowed the appeal holding that the plaintiff had not proved encroachment by the defendants. Therefore, in my opinion, considering all those infirmities the lower appellate Court was justified in not accepting the case set up by the plaintiff about the encroachment by the defendants.

7. In so far as the admission of the defendants is concerned, no doubt in the cross-examination of the plaintiff suggestion was put that even before 1996 the defendants were making gradual encroachments to which

the plaintiff had replied in affirmative. A bare admission in the suggestion made by the defendants to the plaintiff in his cross-examination that the defendants had been making encroachment even prior to 1996 does not advance the case of the plaintiff inasmuch as unless the exact area encroached is established by the plaintiff the suggestion put in the cross-examination of the plaintiff by the defendants would not be sufficient to establish the exact encroachment made by the defendants which is absolutely essential to succeed in a suit for recovery of possession of encroached portion of the land belonging to the plaintiff. Therefore, I do not find any merit in the submission of Mr. Deshpande that the lower appellate Court erred in not considering the admission by way of suggestion in the cross examination of the plaintiff by the defendants. In so far as non production of the sale-deed by the defendants in respect of the property purchased by them is concerned, the same also does not take the case of the plaintiff any further inasmuch as in the absence of cogent evidence being led by the plaintiff to prove encroachment the mere fact that the defendants did not produce the sale-deed would not be fatal to the defence set up by the defendants. Needless to mention that in a suit for recovery of possession the plaintiff has to prove the exact area encroached by the defendant and unless this is established the plaintiff cannot succeed in the suit. In the present case the plaintiff having not established the

exact area encroached upon by the defendants, the lower appellate Court was absolutely justified in allowing the appeal against the decree passed by the trial court decreeing the suit in favour of the plaintiff.

8. For the reasons aforesaid, I do not find any merit in the submissions made by the learned counsel for the appellant. No substantial question of law is involved in the appeal. Hence, the appeal is summarily rejected.

Judge

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